HAROLD B. WILLEY, Cle

Supreme Court of the United States

OCTOBER TERM, 1954

No. 622, Miscellaneous

ED MILAM - - - - - - - - - - Petitioner

v.

COMMONWEALTH OF KENTUCKY - Respondent

MOTION TO DISMISS
and
BRIEF FOR RESPONDENT

J. D. BUCKMAN, JR.
Attorney General
Commonwealth of Kentucky

ZEB A. STEWART
Assistant Attorney General
Commonwealth of Kentucky
Counsel for Respondent

I hereby certify that I have mailed to Ed Milam, Box 128, Eddyville Penitentiary, Eddyville, Kentucky, a true copy of the within motion to dismiss appeal and brief for respondent. This the 24 day of May, 1955.

Zeb A. Stewart
Assistant Attorney General
Frankfort, Kentucky

ROBERTS PRINTING CO., FRANKFORT, KY.

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ED MILAM - - - - - - - - - - - *Petitioner*

V.

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MOTION TO DISMISS
and
BRIEF FOR RESPONDENT

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE JUSTICES OF THE SUPREME COURT CONSTITUTING THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

RESPONDENT'S MOTION TO DISMISS PETITION FOR WRIT OF CERTIORARI

Respondent moves to dismiss petition for writ of certiorari for the following reasons:

1. The Supreme Court of the United States is without jurisdiction to review the decision of the Court of Appeals of Kentucky in its opinion of February 25, 1955, reported in 275 S. W. 2d 921, Advance Sheets No. 5 of date April 12, 1955 affirming petitioner's judg-

ment and sentence of death for wilful murder imposed by the Circuit Court of Christian County, Kentucky.

The Court of Appeals has granted a stay of execution for ninety days from May 6, 1955, and the original record of the Court of Appeals has been transmitted to the Clerk of the Supreme Court.

2. No such federal question is presented as will warrant the Supreme Court to grant certiorari for the following reasons:

Where a conviction for a violation of a state statute has been affirmed by the court of last resort of that state and has been conducted according to long established precedent and rules of evidence, there is no such denial of the due process clause of Section 14 or any other section of the Federal Constitution invoked by petitioner such as to warrant granting certiorari to review the action of the Court of Appeals of Kentucky in affirming petitioner's conviction.

BRIEF FOR RESPONDENT ON MOTION TO DISMISS AND THE MERITS OF THE CASE

The indictment charged petitioner, defendant below, under Section 435.010 of the Kentucky Revised Statutes with the wilful murder of Stephen Farmer by shooting and killing Farmer with a pistol, a deadly weapon. The punishment provided for wilful murder by the aforesaid section of the Kentucky Statutes is death or confinement in the penitentiary for life in the discretion of the jury. One James Robinson was likewise indicted as an aider and abettor of Milam in the commission of said crime. At Robinson's trial, he plead guilty and was sentenced to the penitentiary for life where he is now confined. Robinson's conviction

is here referred to by reason of the fact that Robinson's affidavit dated April ....., 1955 is made a part of Milam's petition for certiorari, in which affidavit Robinson states as follows:

> "I James Robinson, known as the affiant hereinafter, states that he is now confined in the Kentucky Penitentiary at Eddyville, Kentucky, serving a life sentence. Accused of being an accomplice of Ed. Milan, who is now awaiting death in the electric chair, May 6th, 1955.
>
> "This affiant states he and the said Ed. Milan, were arrested in the State of Tennessee on the 17th of July, 1954, by the Tennessee authorities, and held there for the Kentucky authorities. During this wait we were beaten by the Tennessee authorities and made to waive extradition. When the Kentucky authorities arrived we were taken immediately across the state line into Kentucky.
>
> "While in the jail at Hopkinsville, Kentucky, this affiant heard on more than one occasion the high sheriff and the attorney for Ed. Milan, try to get him to sign a confession to the alleged crime of murder. Also this affiant knows that said Sheriff and said Counsel told Ed. Milan that if he did not sign a confession, he would burn in the electric chair.
>
> "Ed. Milan asks of his counsel if by signing a confession would this fact save him from the electric chair and counsel told him it would save him by confessing.
>
> "Affiant states that he was not coerced, intimidated or persuaded to make this affidavit, but it was made of his own free will, and to be the truth.
>
> s/James Robinson."

Upon Milam's arraignment, he pleaded not guilty and, having informed the court he was unable to employ counsel, the trial court appointed counsel in the persons of Hon. Pollard White and Hon. W. O. Soyars, able and experienced members of the Hopkinsville, Kentucky bar, who ably, diligently and skillfully conducted his defense. After conviction and within the time allowed by law, said counsel prosecuted an appeal to the Kentucky Court of Appeals and prepared and filed an able brief in petitioner's behalf. In view of the statements made in Robinson's affidavit and in Milam's petition, and to show the falsity of said affidavit and the allegations contained in the petition, the respondent, Commonwealth of Kentucky, has filed with this Court the joint affidavit of Pollard White and W. O. Soyars dated April 25, 1955, and the affidavit of J. B. Cowherd, Sheriff of Christian County, Kentucky, showing the complete falsity of the statements contained in Robinson's affidavit and Milam's petition. These affidavits are also quoted below:

> "The affiants, W. O. Soyars and Pollard White, having been duly sworn, state that they are both regularly practicing attorneys in Hopkinsville, Christian County, Kentucky; that they were appointed by Christian Circuit Court to defend Ed. Milam in the murder trial at which the said Milam was convicted, and the said Milam now being confined to the State Penitentiary at Eddyville awaiting execution on May 6, 1955.
>
> "The affiants state that they have heard and read the affidavit of James Robinson filed in support of said Milam's motion for stay of execution herein, and affiants say that as far as they know, they were the only attorneys acting on behalf of the said Milam; that at no time did either of these

attorneys or anyone else in their presence, urge the said Milam or suggest to him that he confess to the crime of murder or to any other crime; that these affiants did meet with the said Milam in Christian County Jail on several occasions and discuss the defense of his case with him, but that at no time was the high Sheriff of Christian County or any other official or any other person present at any of said discussions except the said James Robinson who was present on the first two of said discussions.

"Affiants say that the only confession of which they have any knowledge whatever is that confession shown by the record herein to have been given by the said Milam to Russell Greenwell on the night on which Milam was arrested several or many weeks before either of the affiants were appointed by the Court, as aforesaid.

s/W. O. Soyars
Pollard White.

"The affiant, J. B. Cowherd, having been duly sworn, states that he is now and has been since January 4, 1954, Sheriff of Christian County; that the affiant has heard read the affidavit of James Robinson filed herein in support of motion of appellant for stay of execution; that said entire affidavit is false; that at no time has this affiant discussed with the said Milam, either in the presence of attorneys or anyone else, or at all, any confession made or to be made by the said Milam to the crime of murder, or any other crime; that this affiant is informed and believes that the said Milam made a confession on the night of his arrest to Russell Greenwell, Chief of Police of Hopkinsville, Kentucky; that the affiant has never threatened the said Milam or urged him or suggested to him that he make any confession whatever.

s/J. B. Cowherd."

It is doubtful if the affidavit of Robinson can be considered inasmuch as he was in custody and within the jurisdiction of the Christian Circuit Court and was not called as a witness to testify concerning the matters and things set out in his affidavit.

There have also been filed by respondent with the Clerk of the Supreme Court the original affidavits of Judge Ira D. Smith, Judge of the Christian Circuit Court who presided at Milam's trial, and of W. E. Rogers, Jr., County Attorney of Christian County, who assisted in the prosecution of Milam. These affidavits are as follows:

"The affiant, Ira D. Smith, states that he is the duly commissioned and presiding judge of the Circuit Court of Christian County, Kentucky, which is a part of the Third Judicial District of said state.

"The affiant further states that he presided at the trial of the petitioner, Ed Milam, who was indicted and tried for murder in said Court on the 27th day of October, 1954, and given the sentence of death for wilful murder. He further states that at the trial of said case which was upon an indictment duly returned by the Grand Jury of Christian County on September 28th, 1954, the defendant was furnished able and legal counsel to represent him, the Honorable Pollard White and W. O. Soyars, both experienced lawyers and members of the Christian County Bar, and that these attorneys offered every defense in the opinion of the Court that could have been made on behalf of the defendant.

"Your affiant further states that at the beginning of the trial, Counsel for the defendant did make a motion to set aside the indictment for the reason that no negro or person of African descent

was a member of the Grand Jury which returned the indictment, and for the additional reason that the names of persons of African descent or negroes were not placed in the jury wheel from which the trial jury was drawn. Counsel for the defendant filed no affidavits nor did they offer any oral testimony to sustain their motion, and the Court, very well knowing that same was not founded upon fact, over-ruled same.

"For a period of over ten years the Jury Commissioners of Christian County have been instructed by this Court (Christian Circuit Court) to place the names of prospective jurors in the wheel without preference to their race, creed or color, and during the period mentioned, ten years, numerous jurors have served both on the Grand and Petit jury of the Christian Circuit Court who were members of the colored race or negroes. In the year 1954 from which jury wheel both the grand jury and the petit jury that tried the petitioner, Ed Milam, were drawn, at least three or four members of the negro race served in the Christian Circuit Court. So far as the presiding Judge of this Court is able to say there has been absolutely no discrimination shown by the Jury Commissioners in placing names of prospective jurors in the wheel.

"Your affiant further states that the defendant has never been denied the right to testify in his own defense, and that he voluntarily refused to testify after a conference with his Counsel, and that he at no time indicated to the Court either before or after the trial that he did not testify because of any fear or threats. The affiant further states that the only reason the defendant gave the Court when he was formally sentenced was that he thought the Jury had been too hard on him.

s/IRA W. SMITH."

"The affiant, W. E. Rogers, Jr., states that he is the duly elected, qualified, and acting County Attorney of Christian County, Kentucky.

"The affiant states that he has been County Attorney of Christian County, Kentucky, for fourteen (14) years, and that for the last ten years the Jury Commissioners of Christian County have been instructed by the Judge of the Christian Circuit Court to place the names of prospective jurors in the wheel without preference to their race, creed or color, and that during the period for the last ten years numerous jurors have served both on the Grand and Petit jury of the Christian Circuit Court who were members of the negro or colored race.

"The affiant states that upon the trial of this case in the Christian Circuit Court, the defendant failed to testify in his own behalf. The affiant assumes that he voluntarily refused to testify, but that the defendant was not denied the right to testify by the Court.

s/W. E. ROGERS, JR."

PETITIONER HAS NOT EXHAUSTED THE REMEDIES AVAILABLE TO HIM IN THE KENTUCKY COURT OF APPEALS

The Kentucky Criminal Code of Practice and long standing rules of the Kentucky Court of Appeals provide that any appellant, feeling himself aggrieved by any decision of the Court, may within thirty days thereafter petition the Court for rehearing of the case. It is significant that no such petition for rehearing has ever been filed or an extension of time therefor requested. It is a long established rule of judicial procedure in all courts in the United States, both state

and federal we believe, that one will not be heard to complain on appeal or by way of certiorari or otherwise where he has failed to complain in the court below. The reason for this rule is that had any material error been committed or such as complained of here, it could or would have been corrected by the reviewing court, in this case the Court of Appeals of Kentucky.

Milam did not testify at his trial. No witness testified that he was beaten or forced to waive extradition from Tennessee to Kentucky or that he was forced under threats, duress or undue influence to sign a confession admitting said crime, or that the Sheriff or anyone else extorted information to be used against him. We quote below from the opinion of the Kentucky Court of Appeals of February 25, 1955:

> "Able counsel appointed by the court to defend appellant vigorously argue that the circumstances surrounding appellant show he did not voluntarily make the confession introduced in evidence against him. They urge he had been in custody for two or three hours before he gave his confession to Greenwell; that his confession stated the robbery was planned on the night of July 15th, when the attempt to execute it was made in the late afternoon of that day and the confession did not give the true location of the weapon used by appellant. Counsel also call attention that Greenwell testified the Clarksville officers stated to him, 'Milam would not * * * '. (Here an objection, we presume by appellant's counsel, was sustained as the witness was relating hearsay testimony.) Counsel insist these facts show appellant refused to talk voluntarily and he must have been plied with questions and a confession wrung from him which should have been excluded under KRS 422.110.

"Counsel for appellant are right in saying the purpose of the statute is to exclude confessions obtained through 'sweating' or induced by hope or fear raised by promises or threats of one having authority over the accused at the time. They cite Curtis v. Com., 312 Ky. 205, 226 S. W. 2d 753; Tarrance v. Com., Ky., 265 S. W. 2d 52, which sustain their interpretation of the statute. However, counsel have drawn an inference which has no factual basis. Appellant did not take the stand and no one testified he was plied with questions or that either promises or threats were directed at him. On the contrary, Chief Greenwell testified he talked alone to appellant, told him anything he said would be used against him and, 'If he wanted to ease his conscience or get it off his mind' to tell him. Thereupon, appellant confessed to Chief Greenwell, who reduced it to writing, read it over to appellant and the latter signed it.

"Certainly, in the face of this direct and uncontradicted testimony of Mr. Greenwell, we cannot say that appellant's confession was involuntarily made. It is not necessary that a confession be made spontaneously to be voluntary, nor is a confession inadmissible merely because elicited by questions addressed to accused. The fact that a confession was made in response to a question assuming accused's guilt, does not, in itself, render the confession inadmissible, unless the question is so phrased or framed as to trap him and to inspire hope or fear, or was accompanied by menacing circumstances. 20 Am. Jur. 'Evidence', § 500, p. 432; Curtis v. Com., 312 Ky. 205, 226 S. W. 2d 753."

There is not a word of evidence in the record to sustain the allegation of Milam's petition that he was denied the right to testify through fear or otherwise,

nor is there any evidence whatever in the record of the trial to sustain anyone of the six grounds (2 to 7 inclusive) set out in his petition.

It is specifically denied that petitioner was denied or deprived of competent counsel; that he was proceeded against by information or forced to be a witness against himself. The trial court permitted to be read to the jury Milam's affidavit for a continuance referred to as Defense Exhibit No. 2, as to what he alleged he could prove by his claimed absent witnesses, Henry Lee Robinson, Mary Lee Robinson, and Velois Robinson, which affidavit is found in the record of the Kentucky Court of Appeals.

ARGUMENT AND AUTHORITIES

It appears from a copy of Milam's petition for certiorari furnished the Attorney General, the original of which appears to have been filed in the Supreme Court on April 25, 1955, that he is not represented by counsel in the Supreme Court and is representing himself, as he evidently has the right to do. This is always a handicap to the Commonwealth and the Attorney General in the defense of cases such as this in having to deal with a layman not familiar with the law and rules of procedure, notwithstanding the wording and phraseology of the petition for writ of certiorari apparently drafted by some so-called unlicensed "penitentiary lawyer," which shows some familiarity with constitutional provisions and procedure of the Supreme Court and the Court of Appeals of Kentucky set out and relied on in petitioner's index—points and authorities, page 1 of his petition, some of which are set out and quoted from at pages 2, 3 and 3c of his brief

attached to his petition. It is submitted, however, that none of the authorities or cases cited are sufficient to show the following:

1. That the Supreme Court has jurisdiction.

2. That a federal question is involved.

3. That there is any evidence in the record of petitioner's trial that he was denied due process or any constitutional or statutory right.

4. That any error was committed at his trial prejudicial to any substantial right of petitioner or that the Court of Appeals erred in affirming said conviction.

5. There is no evidence in the record to warrant the Supreme Court in assuming jurisdiction or sufficient to warrant the granting of certiorari prayed.

In the case of Howard v. Kentucky, 200 U. S. 164, Howard was indicted, tried, and convicted for the killing of William Goebel. On appeal to the Supreme Court Howard contended that he had been denied due process under the 14th Amendment because of alleged disqualification of the juror, Alexander. The Supreme Court held that there was no denial of due process.

> "Subject to the requirement of due process of law, the states are under no restrictions as to their method of procedure in the administering of public justice." Jordan v. Mass., 225 U. S. 167, 32 S. Ct. 651.

> "Where the proceedings of the State Court were conducted under the ordinary forms of criminal prosecution there was no denial of due process of law." Miller v. Texas, 153 U. S. 535, 38 L. Ed. 812.

> "If the Supreme Court of the State had acted in consonance with the constitutional laws of a

state and its own procedure, it could only be in very exceptional circumstances but this Court would feel justified in saying that there had been a failure of due legal process." Jordan v. Mass., supra.

"The admission of evidence in a criminal case which the high State Court decided did not violate the rights of accused under the State Constitution, and laws, cannot involve a question of due process of law of sufficient merit to sustain a Writ of Error." Barrington v. Missouri, 27 S. Ct. 582, 205 U. S. 483, 51 L. Ed. 890.

"The judgment of state courts will not be reversed by the Supreme Court if they rest on adequate state ground." Hamilton v. Supreme Court of California in and for Los Angeles County 1951, 71 S. Ct. 521, 340 U. S. 622, 95 L. Ed. 586.

"The construction by a state court of the statutes of that state and its rulings as to the admissibility of evidence furnish no basis for Writ of Error." Los Angeles Farming, etc., Co. v. Los Angeles, California, 30 S. Ct. 452, 54 L. Ed. 736.

"The U. S. Supreme Court accepts interpretation of state laws by state appellate court." Madden v. Commonwealth of Kentucky, 1940, 60 S. Ct. 406, 309 U. S. 83, 84 L. Ed. 590, A. L. R. 1383.

"The United States Supreme Court is bound by the construction given to state statutes by state courts." Aero Mayflower Transit Co. v. Board of R. R. Com'rs of State of Mont., Mont. 1947, 68 S. Ct. 167, 332 U. S. 495, 92 L. Ed. 99.

"Judgment of highest state court is conclusive as to construction and application of state statutes and Constitution. Senn v. Tile Layers Protective Union, Local No. 5, Wis. 1937, 57 S. Ct. 857, 301 U. S. 468, 81 L. Ed. 1229. See also Atchi-

son, T. & S. F. Ry. Co. v. Railroad Commission of State of California, 1931, 51 S. Ct. 553, 283 U. S. 380, 85 L. Ed. 1128."

In the case of Buckhalter v. People of New York, 319 U. S. 427, 63 S. Ct. R. 1129, Buckhalter, Weiss and Capone sought by writ of certiorari to have the Supreme Court review their convictions for first degree murder in violation of the laws of the State of New York. In these cases certiorari was denied in opinion by Justice Roberts, from which case we quote:

> "The due process clause of the Fourteenth amendment requires that action by a state through any of its agencies must be consistent with the fundamental principles of liberty and justice which lie at the base of our civil and political institutions, which not infrequently are designated as 'the law of the land.' Where this requirement has been disregarded in a criminal trial in a state court this court has not hesitated to exercise its jurisdiction to enforce the constitutional guarantee. But the Amendment does not draw to itself the provisions of state constitutions or state laws. It leaves the state free to enforce their criminal laws under such statutory provisions and common law doctrines as they deem appropriate; and does not permit a party to bring to the test of a decision in this court every ruling made in the course of a trial in a state court.
>
> " * * * * * As already stated the due process clause of the Fourteenth Amendment does not enable us to review errors of state law however material under that law."

In the case of Curtis v. Commonwealth, 312 Ky. 205, 226 S. W. 2d 753, the Court of Appeals of Kentucky, in affirming Curtis' conviction, wrote as follows:

"Confession made without threats, duress, or other circumstances rendering it involuntary is admissible against person confessing, notwithstanding it is made after arrest. Clark v. Commonwealth, 269 Ky. 833, 108 S. W. 2d 1036; Edmonds v. Commonwealth, 230 Ky. 725, 20 S. W. 2d 745; Myers and Cannon v. Commonwealth, 212 Ky. 245, 278 S. W. 620; Sutton v. Commonwealth, 207 Ky. 597, 269 S. W. 754; Boyd and Jones v. Commonwealth, 194 Ky. 73, 238 S. W. 888; Garrison v. Commonwealth, 169 Ky. 188, 183 S. W. 472; Dorsey v. Commonwealth, 158 Ky. 447, 165 S. W. 405; Hathaway v. Commonwealth, 82 S. W. 400, 26 Ky. Law Rep. 630.

"The purpose of this act is to exclude confessions obtained through the exercise of highly improper methods, amounting to duress or putting in fear, or the offering of inducements or temptations, causing the confession to be made other than by voluntary will. A voluntary confession, although made to an officer while under arrest, is admissible if not obtained by any of the methods prohibited. Powell v. Commonwealth, 276 Ky. 234, 123 S. W. 2d 279.

"In the case of McClain v. Commonwealth, 284 Ky. 359, 144 S. W. 2d 816, 818, wherein we quoted from Bennett v. Commonwealth, 242 Ky. 244, 46 S. W. 2d 84, we said:

" 'The "plying with questions," forbidden by Section 1649b-1 means "the persistent and repeated propounding of inquiries to elicit a desired answer, carried to such an extent that the prisoner feels required to answer as the questioner wishes in order to escape from the pressure." '

"Our interpretation of the statutory section as above shown is in accord with the general rule approved by text writers and courts of other states

as it appears in 20 Am. Jur. 432 and 433, Section 500, in which it is written:

"'Spontaneity is not necessary to the voluntariness of a confession, and in this country it is universally recognized that a confession is not rendered inadmissible in evidence merely because it was elicited by inquiries and questions addressed to the accused. This rule applies whether the questioning is done by a magistrate, prosecuting attorney, police officer or private person. * * *

"'The fact that the confession was made in response to a question assuming the guilt of the accused is not of itself sufficient to exclude it, unless the question was so framed as to trap the accused and inspire hope or fear or was accompanied by menacing circumstances.'

"We therefore conclude that the confession of appellant in this case was not an involuntary one and therefore admissible.

"Wherefore, the judgment is affirmed."

In the case of O'Brien v. O'Brien, 321 U. S. 766, 88 L. Ed. 1063, 172 S. W. 2d 595, 294 Ky. 793, the Court of Appeals of Kentucky wrote as follows:

"If the rulings of the court should be regarded as erroneous, such action does not in our opinion offend constitutional rights. Due process of law does not assure a litigant against a wrong interpretation of the law, especially procedural, or against a judicial error in respect to the admission or exclusion of evidence. Arrowsmith v. Harmoning, 118 U. S. 194, 6 S. Ct. 1023, 30 L. Ed. 243; Ex parte Converse, 137 U. S. 624, 11 S. Ct. 191, 34 L. Ed. 796; Jones v. Buffalo Creek Coal & Coke Co., 245 U. S. 328, 38 S. Ct. 121, 62 L. Ed. 325; In re Pusey's Estate, 321 Pa. 248, 184 A. 844, certiorari denied Lavely v. Y. M. C. A., 299 U. S. 572, 57 S.

Ct. 36, 81 L. Ed. 422; Stephenson v. Kirtley, 269 U. S. 163, 46 S. Ct. 50, 70 L. Ed. 213."

The O'Brien case was appealed from the Kentucky Court of Appeals to the Supreme Court of the United States by way of petition for Writ of Certiorari which was refused as not violative of the Due Process Clause of the Constitution (321 U. S. 766, 88 L. Ed. 1063).

In the October Term, 1941 there came before your Honors by way of petition for writ of certiorari to review a judgment of the Supreme Court of California affirming a death sentence in the case of Lisenba v. California. Certiorari was denied. We quote from the opinion by Justice Roberts reported in 314 U. S. 219-243, 86 L. Ed. 166, as follows:

> "Assuming for the sake of argument that the trial court erred in receiving the evidence relating to the murder of Winona James in Colorado, nevertheless, such an error does not raise a Federal question within the meaning of the Fourteenth Amendment of the Constitution of the United States. In order that it may be said that due process of law has been denied to petitioner, it must affirmatively appear, not only that error was committed by the trial court, but further, that the error was so gross as to amount to no trial at all, as that term is ordinarily understood. Re Converse, 137 U. S. 624, 34 L. Ed. 796, 11 S. Ct. 191; Arrowsmith v. Harmoning, 118 U. S. 194, 30 L. Ed. 243, 6 S. Ct. 1023; American Ry. Exp. Co. v. Kentucky, 273 U. S. 269, 71 L. Ed. 639, 47 S. Ct. 353; Roberts v. New York, 295 U. S. 264, 79 L. Ed. 1429, 55 S. Ct. 689; Howard v. Kentucky, 200 U. S. 164, 50 L. Ed. 421, 26 S. Ct. 189."

In the case of Gilbert Tinsley v. Commonwealth of Kentucky, your Honors denied writ of certiorari

October 12, 1953, Memorandum Opinion, reported in 74 S. Ct. 22, and declined to take jurisdiction. See also Jordan v. Mass., 225 U. S. 167, 32 S. Ct. 651; Barrington v. Missouri, 27 S. Ct. 582, 205 U. S. 483, 51 L. Ed. 890.

In the case of Chester Merrifield v. Commonwealth of Kentucky, Advance Sheets No. 6, February 28, 1955, 99 S. Ct. 275, certiorari was denied for lack of jurisdiction. Likewise in the case of Leonard Tarrence v. Commonwealth of Kentucky, Advance Sheets December 20, 1954, 99 S. Ct. 167, certiorari was also denied for lack of jurisdiction. It is worth noting that the petition for certiorari in the Tarrence case was predicated mainly on the matter of a confession of the crime of murder made by Tarrence to the Commonwealth's Attorney under a claimed promise of immunity from the death penalty which Tarrence testified was promised or held out to him. In the present case Milam did not testify or go on the stand at all and all the evidence in the case is to the effect that his confession admitted in evidence was voluntary and without any violation of the Kentucky anti-sweating act.

Your Honors also denied certiorari in the following Kentucky cases: Tommy Nelson v. Commonwealth, 297 Ky. 189, 65 S. Ct. 86, 323 U. S. 755, 89 L. Ed. 604; Bass v. Commonwealth, 65 S. Ct. 64, 323 U. S. 745, 89 L. Ed. 596, 296 Ky. 426, 175 S. W. 2d 386; and Bircham v. Commonwealth, 238 S. W. 2d 1008, 72 S. Ct. 55, 392 U. S. 805, 96 L. Ed. 609.

THE QUESTION OF ALLEGED DISCRIMINATION ON ACCOUNT OF RACE OR COLOR

This question is not specifically or sufficiently set out or alleged in Milam's petition but is referred to in brief, page 1a.

The record in the Court of Appeals of Kentucky, duly certified by the Clerk of the Christian County Circuit Court, pages 2-3, shows that when Milam was arraigned on the indictment he pleaded not guilty. The record further shows that his assigned counsel moved to quash the indictment, said motion also challenging the panel of the petit jury herein and that the court being advised overruled said motions and each of them, to which defendant objected and excepted. The record of the Court of Appeals shows that the motion to quash was overruled. However, we do not find that the motion to quash was verified by affidavit and no proof appears to have been offered or heard in support of said motion. In the absence of verification or proof to sustain the allegations of the motion to quash, the court was fully justified in overruling the motion since the burden rested with movant to sustain the allegations of his motion by proof, which he failed to submit. The rule is universal that an allegation made in a pleading or motion not supported by evidence must be denied, the rule being that the burden rests with the party asserting a proposition to prove it even though the motions had been verified by movant.

However, be this as it may, the affidavit of Judge Smith affirmatively shows that there was no discrimination on account of defendant's color in the respects complained of. In the Kentucky case of Montjoy v. Commonwealth, 262 Ky. 426, 90 S. W. 2d 362, involv-

ing a motion to quash and set aside indictment because of exclusion of negroes from grand and petit juries, the Court of Appeals held that it was not error in the prosecution of a negro to deny such motion when no evidence was presented, offered or heard to support the claim of "exclusion" or "discrimination." We quote from the Montjoy opinion as follows:

> "So far as we observe, there is a total absence of anything contained in the motions which would bring to the court cognizable notice that persons of any race, and particularly the race to which accused belongs, had been excluded from service on either of the juries. Nor was there any affidavit made, proof or testimony offered, which would put the commonwealth to denial, or permit the court to consider or pass on the motions or either of them. Under these circumstances, this court is in no position to say that the trial court committed error, but on the other hand, can well say that in the absence of the essential proof the court did not commit error in these respects. Some of the cases which counsel for appellant cite demonstrate the necessity of bringing to the attention of the trial court facts in some form, so as to permit an intelligent ruling.
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> "These cited cases are: Carter v. Texas, 177 U. S. 442, 20 S. Ct. 687, 44 L. Ed. 839; Strauder v. West Virginia, 100 U. S. 303, 25 L. Ed. 664; Neal v. Delaware, 103 U. S. 370, 26 L. Ed. 567; Gibson v. Mississippi, 162 U. S. 565, 16 S. Ct. 904, 40 L. Ed. 1075; Rogers v. Alabama, 192 U. S. 226, 24 S. Ct. 257, 48 L. Ed. 417; Martin v. Texas, 200 U. S. 316, 26 S. Ct. 338, 339, 50 L. Ed. 497; Powell v. Alabama, 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158, 84 A. L. R. 527; Bush v. Kentucky, 107 U. S. 110, 1 S. Ct. 625, 27 L. Ed. 354; Norris v. State of Ala-

bama, 294 U. S. 587, 55 S. Ct. 579, 79 L. Ed. 1074; Patterson v. State of Alabama, 294 U. S. 600, 55 S. Ct. 575, 79 L. Ed. 1082; Aldridge v U. S., 283 U. S. 308, 51 S. Ct. 470, 75 L. Ed. 1054, 73 A. L. R. 1203.

"In order to determine whether there was anything in any of these cases which might indicate that the Supreme Court had held directly or indirectly that the question might be raised here, or in that court, in the manner here presented, without proof in support of a mere allegation by motion, we have reviewed these cases and have found the contrary to be true.

"In the first case cited, Carter v. Texas, supra, in which the court below refused to hear evidence in support of a similar motion, it is made apparent that it was essential that testimony to sustain allegations made should be heard. In Martin v. Texas, supra, there was a motion to quash an indictment, the ground being the same as here, and though the motion was verified, the court held that the motion itself could not be regarded as proper proof. The court said:

" 'The grounds assigned for quashing the indictment should have been sustained by distinct evidence introduced, or offered to be introduced, by the accused. He could not, of right, insist that the facts stated in his motion to quash should be taken as true simply because his motion was verified by his affidavit. The motion to quash was therefore, unsupported by any competent evidence consequently, it cannot be held to have been erroneously denied.' "

The Montjoy case was appealed to the Supreme Court of the United States and the appeal was dis-

missed. See Montjoy v. Commonwealth, 298 U. S. 646, 56 S. Ct. 961, 80 L. Ed. 1376.

CONCLUSION

It is therefore respectfully submtited that the Supreme Court is without jurisdiction and the motion to dismiss ought to be sustained or that, if jurisdiction should be taken, the writ of certiorari should be denied.

Respectfully submitted,

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